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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

INGRID HENDRICKS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civ. No. 1999-033**
	)	
GRACIANO BELARDO,	)	
	)	
Defendant.	)	
	)	

ATTORNEYS:

Jean-Robert Alfred, Esq.,
St. Croix, U.S.V.I.
For the plaintiff,

Lee J. Rohn, Esq.,
St. Croix, U.S.V.I.
For the defendant.

MEMORANDUM

MOORE, J.

This matter is before the Court on Ingrid Hendricks' ["Hendricks"] motion to set aside this Court's order of April 2, 2001, which held that Hendricks lacked standing. This Court will deny her motion.

I. BACKGROUND

Hendricks had sought to invalidate a revocable trust established by her deceased father, Christian Hendricks [the "decedent"], on grounds that the defendant trustee, Graciano Belardo, unduly influenced the decedent during the creation of

the trust while he was frail and suffering from Alzheimer's disease. I ruled that Hendricks lacked standing to litigate this matter as she neither possessed a material interest in nor would benefit from an invalidation of the trust agreement.[1] Hendricks now seeks to set aside this judgment.

II. DISCUSSION

Hendricks relies on Rule 60(b)(6) of the Federal Rules of Civil Procedure in seeking to set aside this Court's previous judgment. This provision states in part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (6) any

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[1] Hendricks sought to invalidate the trust, which provided her with $5 and dispensed the decedent's properties to various other parties, including Belardo. This Court noted

> If the trust agreement were invalidated, she still would receive only five dollars under the terms of the decedent's last will and testament ["will"], which Hendricks does not contest. Item VI of the decedent's will, entitled "Gift of Remainder," provides for the "pour over" of all of the decedent's property, except for some personal and household effects devised in Item V of the will, into the trust for distribution according to the terms of the trust agreement. Item VII of the will, entitled "Alternative Gift of Remainder," provides that, in the event that the bequest and devise in Item VI fails, the rest, residue and remainder of the decedent's property be devised to the executor of the will for distribution according to the terms of the trust agreement. Accordingly, even if the Court were to invalidate the trust agreement, Hendricks would still only receive five dollars under the terms of the will, which incorporates by reference the distribution scheme of the trust document.

Hendricks v. Belardo, Civ. No. 99-33, slip op. at 4-5 (D.V.I. Apr. 2, 2001), *available at* www.vid.uscourts.gov.

> other reason justifying relief from the operation of the judgment.

In an effort to evince a justification for relief under Rule 60(b)(6), Hendricks argues that: (1) her *pro se* status prevented her from "articulat[ing] and outlin[ing] the legal issues affecting her valid claim against . . . Belardo and his agents or representatives" (Pl.'s Mot. to Set Aside J. at 1.); and (2) supporting affidavits manifest Belardo's undue influence over the decedent. (Mem. of Points and Authorities in Supp. of Pl.'s Mot. to Set Aside J. at 5.)

Hendricks' reliance on Rule 60(b)(6) is misplaced because she, in essence, argues that her mistake or excusable neglect along with newly found evidence justify setting aside this Court's judgment.[2] Such arguments more aptly fall within the purview of Rule 60(b)(1) and (b)(2) respectively. "It is only necessary to fall back on Rule 60(b)(6) when the reason for relief is not covered by any of the other provisions of 60(b) and the movant can establish exceptional circumstances which warrant

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[2] Even assuming that Rule 60(b)(6) is applicable, Hendricks fails to establish the extraordinary or exceptional circumstances necessary to justify relief. *See Newland Moran Real Estate v. Green Cay Props., Inc.*, 40 V.I. 211, 216, 41 F. Supp. 2d 576, 580 (D.V.I. App. Div. 1999) (noting that the "movant [must] establish exceptional circumstances which warrant extraordinary relief"); *see also Virgin Islands Bldg. Specialties, Inc. v. Buccaneer Mall Assocs.*, 197 F.R.D. 256, 259 (D.V.I. App. Div. 2000) (noting that a party needs "to demonstrate the required extraordinary circumstances" to prevail under Rule 60(b)(6)). As the arguments Hendricks relies on fail under their appropriate provisions, *see Discussion*, *infra* II.A and II.B, it is highly unlikely that such arguments would constitute extraordinary or exceptional circumstances under Rule 60(b)(6).

extraordinary relief." *Newland Moran Real Estate v. Green Cay Props., Inc.*, 40 V.I. 211, 216, 41 F. Supp. 2d 576, 580 (D.V.I. App. Div. 1999); *see also Virgin Islands Bldg. Specialties, Inc. v. Buccaneer Mall Assocs.*, 197 F.R.D. 256, 259 (D.V.I. App. Div. 2000) (holding that a movant cannot rely on Rule 60(b)(6) as a substitute for any of the other subsections of the rule). Despite Hendricks' reliance, through counsel, on the wrong provision of Rule 60(b), this Court will consider her motion according to the correct provisions, namely 60(b)(1) and (2).

A. Rule 60(b)(1)

Rule 60(b)(1) permits a court to set aside a final judgment where there exists "mistake, inadvertence, surprise, or excusable neglect" on the part of the movant. Although courts have granted parties liberties under Rule 60(b)(1),[3] this is not without limits. In particular, "a party's ignorance of the law and carelessness in its application are not sufficient grounds under Rule 60(b) . . . ." *Douris v. County of Bucks*, No. Civ. A. 99-3357, 2001 WL 1347014 *2 (E.D. Pa. Sept. 19, 2000); *see also McCormick v. City of Chicago*, 230 F.3d 319, 327 (7th Cir. 2000); *FHC Equities, L.L.C. v. MBL Life Assurance Corp.*, 188 F.3d 678

[3] *Newland Moran*, 40 V.I. at 216 (holding that party's failure to prosecute was excusable); *Vessup v. Cochran*, 38 V.I. 77, 79-82 (Terr. Ct. 1997) (finding that failure to appear at trial due to miscommunication with counsel was excusable neglect).

(6th Cir. 1999); *Rogers v. Hartford Life & Accident Insur. Co.*, 167 F.3d 933, 943 (5th Cir. 1999) (quoting *Ben Sager Chem. Int'l., Inc. v. E. Targosz & Co.*, 560 F.2d 806, 809 (7th Cir. 1977).

The crux of Hendricks' Rule 60(b) motion is that, as a *pro se* litigant, she did not understand the differences between a trust and a will and thus "failed to articulate and outline the legal issues affecting her valid claim against . . . Belardo . . . ." (Pl.'s Mot. to Set Aside J. at 1.) Despite any sympathies this Court may have toward Hendricks on account of the alleged disadvantages she encountered due to her *pro se* status, it must remain impartial. Moreover, I note that Hendricks repeatedly chose to proceed *pro se* and ignored the presiding magistrate judge's admonitions to retain counsel. Consequently, this Court need not "take up the slack when a party elects to represent [her]self." *Eagle Eye Fishing Corp. v. United States Dept. of Commerce*, 20 F.3d 503, 506 (1st Cir. 1994) (citing *McKasle v. Wiggins*, 465 U.S. 168, 183-84 (1984); *see also Peebles v. Moses*, Civ. No. 639/1993 1999 WL 117764 *5 (Terr. Ct V.I. 1999) (noting that "the Court must not undertake [a party's case] because he refuses to retain an attorney or even consult with one regarding his case.").

In essence, Hendricks wants another opportunity to fine-tune her complaint to gain standing and avoid summary judgment in favor of Belardo. This Court must reject such an effort as it would provide her with special treatment not afforded to other litigants. "Every . . . litigant, especially *pro se* litigants, would seek the same treatment and a similar second opportunity . . . if the first . . . results in an adverse judgment. Thus, no judgment involving *pro se* litigants would become final . . . . Moreover, the concept of res judicata could become a nullity and a meaningless concept." *Peebles*, 1999 WL 117764 at *5. "The right of self-representation is not 'a license not to comply with relevant rules of procedural and substantive law.'" *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 140 (1st Cir. 1985) (quoting *Faretta v. California*, 422 U.S. 806, 835 n. 46 (1975)). As Hendricks chose to represent herself, she must bear responsibility for the outcome. Accordingly, her claimed failure to understand and articulate the differences between a trust and a will does not constitute either a mistake or excusable neglect for purposes of Rule 60(b)(1).

B. Rule 60(b)(2)

Rule 60(b)(2) permits a court to set aside a final judgment where there exists "newly discovered evidence which by due diligence could not have been discovered in time to move for a

new trial under Rule 59(b)." FED. R. CIV. PRO. 60(b)(2). This jurisdiction defines "newly discovered evidence" as "evidence of facts in existence at the time of trial of which the aggrieved party was excusably ignorant." *Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir. 1991); *see also Henry v. Hess Oil Virgin Islands Corp.*, 163 F.R.D. 237, 244 (D.V.I. 1995). To prevail under this subsection, the new evidence: "(1) [must] be material and not merely cumulative, (2) could not have been discovered before trial through the exercise of reasonable diligence and (3) would probably have changed the outcome of the trial." *Compass Tech. v. Tseng Labs.*, 71 F.3d 1125, 1130 (3d Cir. 1995); *see also Henry*, 163 F.R.D. at 244. The party requesting relief under Rule 60(b)(2) "bears a heavy burden." *See Compass Tech.*, 71 F.3d at 1130.

In support of her request to set aside the judgment, Hendricks presents two affidavits as newly discovered evidence. Both affidavits purport to show that: Hendricks and the decedent had a good relationship (Hughes Aff. ¶ 4, July 6, 2001; Bermudez Aff. ¶ 3, July 5, 2001); decedent's son was to receive the butcher shop (Hughes Aff. ¶ 6, July 6, 2001; Bermudez Aff. ¶ 7, July 5, 2001); and other parties were "trying to put [the decedent] in a home." (Bermudez Aff. ¶ 5, July 5, 2001.) A review of the record, however, reveals that neither of these

affidavits satisfies the requirements of Rule 60(b)(2).

Both affiants were deposed, pursuant to notice and subpoena, on January 11, 2001. As the information provided in the affidavits resembles that in the depositions, this information could just as easily been uncovered before this Court's April 2d order.[4] The fact that Hendricks had notice and yet failed to appear at either of these depositions does not change this reasoning. She never filed a protective order to continue the depositions or provided a reason for failing to attend the depositions. Moreover, Hendricks simply could have obtained a transcript of the depositions to determine what evidence was adduced. Finally, as Hendricks is the mother of one of the affiants (Anibal Bermudez), it is reasonable to assume that she was privy to his information well before April, 2001. Accordingly, as Hendricks failed to use reasonable diligence to discover the evidence in question before trial, she cannot now be considered "excusably ignorant" of its existence before trial.

Finally, this "new" evidence would not change the outcome of this case. Hendricks seeks to establish that Belardo unduly influenced the decedent during the creation of the trust and will. Her "new" evidence alleges that "Gleston Sargeant, Tony

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[4] As the affiants do little more than summarize their depositions, it appears that these affidavits are merely cumulative and, thus, fail to satisfy the first requirement of Rule 60(b)(2). As this Court concludes that these affidavits are not newly discovered evidence based on the last two requirements of Rule 60(b)(2), it will not address the first requirement.

Hendricks, and Lee Rohn told [the decedent] that Ingrid Hendricks was trying to put him in a home." (Bermudez Aff. ¶ 5, July 5, 2001.) From this, Hendricks deduces that the decedent "was under the erroneous impression that his daughter . . . intended to wrest control of his property by declaring him mentally incompetent to run his business. Such rumors, which *may* have been spread or encouraged by . . . Belardo, influenced [the decedent] to disinherit the Plaintiff in both the Will and Trust Agreement." (Mem. of Points and Authorities in Supp. of Pl.'s Mot. to Set Aside J. at 5.) (emphasis added) This is neither the clear and convincing "evidence that . . . Belardo and/or his representatives and agents acted illegally by improperly influencing [the decedent]" that Hendricks claims it to be. (Pl.'s Mot. to Set Aside J. at 1.) First, there is no evidence that Belardo himself unduly influenced the decedent.[5] Second,

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[5] In this jurisdiction, undue influence is presumed "where the donor of a gift is aged and physically infirm and a relationship of trust and confidence existed between the donor and the donee . . . ." *Joseph v. Eastman*, 344 F.2d 9, 12 (3d Cir. 1965); *see also Wilkinson v. Simmon*, 34 V.I. 74, 85 (Terr. Ct. 1996). This presumption, however, can be overcome by clear and convincing evidence "that no deception was practical, no undue influence was used, and that all was fair, open, voluntary, and well understood." *Joseph*, 344 F.2d at 12. In her latest memorandum, Hendricks alleges that Belardo *may have* spread rumors that Hendricks was attempting to gain control of the decedent's business by declaring him incompetent and that this conduct unduly influenced the decedent to disinherit Hendricks. (Mem. of Points and Authorities in Supp. of Pl.'s Mot. to Set Aside J. at 4-5.) There is, however, nothing in the record, other than these bare allegations themselves, to support this assertion. As the Territorial Court adjudged the decedent "capable of understanding and acting in the ordinary affairs of his life," *In re Christian Hendricks*, Family No. G8/1995 (Terr. Ct., St. Croix Div., May 16, 1996), and the record is sparse of evidence regarding undue influence, it appears that Belardo could overcome a presumption of undue influence.

there is no evidence that the parties Hendricks claims unduly influenced her father, namely Gleston Sargeant, Tony Hendricks and Lee Rohn, are agents or representatives of Belardo. Finally, Hendricks did in fact attempt to declare the decedent mentally incompetent. *See In re Guardianship of Christian Hendricks*, Family No. G8/1995 (Terr. Ct., St. Croix Div., May 15, 1996) (dismissing Hendricks' claims and declaring the decedent to be capable of conducting his affairs), *aff'd*, Civ. App. No. 98-172 (D.V.I. App. Div. Aug. 16, 2001). As the affidavits do not directly address Belardo's conduct in relation to the undue influence and Hendricks' own conduct may have provided the basis for the decedent's act of disinheritance, these affidavits would not change the outcome of this case. Accordingly, Hendricks fails to satisfy the requirements for newly discovered evidence under Rule 60(b)(2).

III. CONCLUSION

Hendricks has not provided ground for relief from the April 2, 2001 judgment under Rule 60(b). Her conduct cannot be considered a mistake or excusable neglect nor are the affidavits newly discovered evidence. Consequently, this Court will deny her motion to set aside the judgment.

ENTERED this 30th day of August 2001.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By:_____/s/_____
Deputy Clerk

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St. Croix, U.S.V.I.
For the defendant.

ORDER

For the reasons set forth in the foregoing Memorandum of even date, it is hereby

ORDERED that Ingrid Hendrick's motion to set aside judgment is **DENIED.**

ENTERED this 30th day of August, 2001.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By:_____/s/_____
Deputy Clerk

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